Filed 2/15/05 In re Taylor S. CA2/2

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

In re TAYLOR S., a Person Coming Under the Juvenile Court Law.	B175126 (Los Angeles County Super. Ct. No. CK29441)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. GINA F., Defendant and Appellant.	

APPEAL from orders of the Superior Court of Los Angeles County. Emily A. Stevens, Judge. Affirmed.

Lisa A. DiGrazia, under appointment by the Court of Appeal, for Defendant and Appellant.

Raymond Fortner, Acting County Counsel, Larry Cory, Assistant County Counsel, and Aleen L. Langton, Deputy County Counsel, for Plaintiff and Respondent.

Gina F. (mother) appeals from the order denying her Welfare and Institutions Code section 388[1] petition and the order terminating her parental rights with respect to her son, Taylor S. (the minor). We affirm.

FACTS

We take judicial notice of our prior nonpublished opinion involving mother and the minor, *In Re Taylor S.* (Feb. 18, 2004, B166188), and incorporate the statement of facts in that opinion as though set forth herein. As relevant to this appeal, we note the following facts:

In December 2002, when the minor was only a few days old, he was detained after the Department of Children and Family Services (the Department) received a hospital referral alleging caretaker incapacity due to mother's paranoid behaviors and uncertainty about her ability to care for the minor. At the time, mother was on Social Security Income for an emotional disability. She had a history of checking herself into mental hospitals and taking psychotropic medication.

The minor was placed with the paternal grandmother (grandmother) and mother was granted three visits a week with the minor in the Department's Lakewood office. At the contested jurisdictional hearing, mother's therapist testified that mother was suffering from posttraumatic stress disorder caused by incidents during her childhood when she felt threatened, and also by her hospitalization during a prior pregnancy with her second child. When confronted with triggers for her condition, it was more difficult for her to act in a rational manner. Her triggers were father and grandmother.

In early 2003, Mother moved to Orange County.

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[1] All further statutory references are to the Welfare and Institutions Code unless otherwise indicated.

On March 12, 2003, the juvenile court adopted a case plan that required mother to participate in parent education, domestic violence counseling, and individual counseling to address mental and emotional issues, parenting issues and anger management. Mother attended individual counseling six times from March 2003 to May 2003. The counselor reported: "[Mother] has enduring symptoms of depressed mood, difficulties in arousing energy to perform normal daily activities, feelings of hopelessness and general difficulties with managing stress."

From March 19, 2003, to April 11, 2003, mother attended seven visits with the minor but missed five visits. She agreed to change her visitation from three times a week for two hours per visit to two times a week for three hours per visit. From April 14, 2003, to July 3, 2003, mother attended seven visits at the Department's Lakewood office but missed 15 visits. On June 5, 2003, a social worker transported the minor to visit mother at a psychiatric hospital. On the dates that mother failed to attend her visits, she did not call the social worker in advance.

Mother's stay at the psychiatric hospital was voluntary. When she checked in, she was extremely anxious, somatic and complaining of frequent panic attacks. She stated: "I'm going to die. I don't want to die." Her admitting diagnosis was depressive disorder, and the goal of the hospitalization was to improve her mood symptoms through psychotherapy and medication. She remained anxious and somatic during most of her stay, and she complained about the medication. Toward the end of her stay she began complying with the medication and her condition improved. Her final diagnosis was somatization disorder.[2] She was instructed to follow up with Orange County Department of Mental Health.

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[2] According to mother's opening brief, somatization disorder is a disorder marked by numerous recurring physical complaints and symptoms that do not seem to have a medical cause.

The social workers reported that mother complained about father and grandmother during her scheduled visits. She sometimes yelled and ranted, which upset the minor. During the visit at the psychiatric hospital, the minor turned away from mother and cried the entire time.

At the six month review hearing in July 2003, which mother did not attend, it was reported that mother was in a psychiatric hospital due to panic attacks. The hearing was continued.

In August 2003, mother reported that she was not well and was trying to obtain a medical diagnosis. She wanted to see the minor but told a social worker that she had "blacked out again" and could not drive. She also stated: "I would give [grandmother] legal guardianship if she would bring him to see me because I can't take care of the baby[.] I would have but something is wrong with me now[.] I am really sick, it is chronic, and I can barely do anything." Due to her condition, she did not think she would be able to go to court again.

Mother was absent from the continued review hearing on August 20, 2003, because she was going to the hospital every day regarding medical issues. The hearing was continued a second time, but mother's counsel was instructed to interview mother to gather relevant information.

Prior to the next hearing, a social worker interviewed mother in an emergency room at a hospital. She appeared to be physically healthy, but she complained of chest pains and blood pressure problems. She signed an affidavit stating that she wanted the minor placed in foster care and also: "Until the medical doctors find factual causes of my medical conditions and solutions I think[] I should have a chance to have a bond with [the minor] [because] that . . . never happened when [grandmother] had been taking care of [the minor] since 6 days old. . . . Now I am in need of psychological [and] physical medical care mostly for stress [induced] panic attacks, ovarian mass[,] swollen lymph nodes[,] chest pains[,] lobile blood pressure, low progesterone[,] major [allergies], and chronic sinus disease[.] I need lots of [medical] care and now that [grandmother] [stole]

my child [through] the system my body got more unhealthy and I hope to get well knowing my baby and I can be back together without [grandmother's] power or control[.] Please put my baby in another mutual home so I can relax to raise him in the near future. I have been in [and] out of doctors [and] hospitals since May 2003 nonstop for all the above problems."

Mother did not appear for the continued hearing on September 4, 2003, because she was still in and out of hospitals. The social worker informed the juvenile court that it's "my understanding that . . . [mother has] never been admitted to the hospital. She goes to [the] E.R. on a daily basis. She hospital hops. That's what the doctor told me." The juvenile court proceeded without mother. It heard argument and then terminated mother's reunification services. It also set a date for a section 366.26 hearing.

Grandmother wanted to adopt the minor and the Department recommended termination of mother's parental rights.

At the section 366.26 hearing in January of 2004, mother told the juvenile court that she had not been able to see the minor due to her illnesses. She requested that the Department transport the minor to an Orange County facility for visits. The juvenile court instructed the Department to set up two or three visits in Orange County. The hearing was then continued to March 9, 2004.

Mother visited the minor on January 28, 2004. The minor struggled and cried whenever mother picked him up. The next visitation was set for March 4, 2004, but mother did not show up.

Mother filed a section 388 petition to modify the order setting the section 366.26 hearing. She requested an order reinstating reunification services, permitting unmonitored visits in her home, and releasing the minor to her custody. She alleged: "1. Mother has established a child to parent attachment and child has such familiarity with mother that ensures child would not be at risk physically, psychologically or emotional. 2. Mother continues to reside in a different county than father. 3. Mother continues to visit child at a frequency that is the full extent of her ability. 4. Reasonable

services have not been provided to accommodate mother." Mother claimed that the requested modifications of prior orders would be in the minor's best interests because the minor "would be raised by the natural mother with all benefits flowing from such a relationship." Mother did not submit a declaration in support of her petition, nor did she provide any exhibits.

On March 16, 2004, the continued date of the hearings for the termination of parental rights and the section 388 petition, mother did not appear. Mother's counsel argued as follows: Mother moved to Orange County to avoid her "toxic relationship" with father. As a result, she was not receiving sufficient visitation with the minor. She visited as often as she could, "but certainly it was not enough to form a strong bond between her and [the minor]." The last time mother visited the minor, he was "jittery, was not conducive to remaining with her for any great period of time, and . . . mother feels that this is indicative of the lack of nurturing and rearing that the [minor] is getting in the home where she is living. That is . . . mother's position. [¶] She would not like to have her parental rights terminated."

The juvenile court denied the section 388 petition, stating: "It has not been shown by a preponderance of the evidence that . . . [the minor] would benefit from the proposed modification, and it's certainly not in his best interest. [¶] First of all, the [juvenile court] has addressed visitation and reasonable efforts at every step along this process. The Department is not impeding, has not impeded [mother's] visitation. This grandmother has not impeded [mother's] visitation. [Mother's] own issues have prevented her from participating in the case plan and the visitation. In fact, [mother] has demonstrated, if nothing else, that she cannot take care of herself, let alone take care of [the minor]. She remains physically, emotionally, and psychologically unstable, and it would not be in [the minor's] interest."

The juvenile court went on to state: "Regarding the [section 366.26] hearing, the [juvenile court] finds that the [section 366.26, subd.] (c)(1)(A) exception does not apply here. [¶] [Mother] has not visited on a regular basis notwithstanding that the Department

and the caretaker have been amenable to that. [Mother] has not developed a relationship with [the minor] or an attachment. . . . [¶] So even if [mother] was visiting . . . . , the minor would not benefit from continuing with that relationship. [Mother] is not competent or capable of taking care of this child alone or unmonitored. [¶] And given that there is not a [section 366.26, subd.] (c)(1)(A) exception, the [juvenile court] finds by clear and convincing evidence that it's likely [the minor] will be adopted."

The juvenile court found that the Department provided reasonable services and terminated mother's parental rights.

This timely appeal followed.

DISCUSSION

I. The juvenile court properly denied mother's section 388 petition.

A juvenile court is vested with the discretion to modify or set aside a prior order upon the petition of a parent demonstrating a change of circumstances or new evidence. (§ 388, subd. (a).) "[T]he burden of proof is on the moving party to show by a preponderance of the evidence that there is new evidence or that there are changed circumstances that make a change of placement in the best interests of the child." (§ 388, subd. (a).) *In re Stephanie M.* (1994) 7 Cal.4th 295, 317.) We will uphold the denial of a section 388 petition unless the parent can demonstrate an abuse of discretion. (*In re Jasmon O.* (1994) 8 Cal.4th 398, 415-416.)

Mother challenges the adequacy of reunification services and also her visitation pending the permanency planning hearing. Though she conflates the two, we separate them for a proper discussion.

A. *The juvenile court properly denied mother's section 388 petition because there was no new evidence regarding the adequacy of reunification services*.

Though mother proceeded on four points in her section 388 petition, she now focuses on the allegation that the Department failed to provide her with reasonable reunification services.[3] She contends that because the Department did not facilitate visitation in Orange County, she must be given six more months of reunification services or, at a minimum, six months of visitation.

The problem is that though mother's section 388 petition arguably set forth a prima facie case entitling her to a hearing, she did not offer any new evidence to support the allegations in her petition. Consequently, we can only conclude that the juvenile court acted well within its discretion when it denied mother's petition and declined to modify the order terminating reunification services.

Mother contends that the juvenile court should have modified the order terminating reunification services based on evidence that she was ill and could not travel to the scheduled visits. We note, however, that mother relies on evidence that was documented in the Department's many reports and available to the juvenile court at the section 366.21 hearing on September 4, 2003.

B. *Any issue regarding the adequacy of the visitation pending the permanency planning hearing was waived*.

Mother contends that although "the juvenile court ordered [her] to have reasonable monitored post-reunification visitation, the extraordinary circumstances prevented that visitation from taking place in Lakewood as ordered." She posits that she could not drive and "needed the visits to occur at her home, or very close to her home or, if she was hospitalized, at the hospital."

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[3] As a temporal matter, this could not be a changed circumstance because reunification services were terminated long before mother's section 388 petition was heard. Therefore, we view this portion of mother's petition as being premised on the existence of new evidence.

This point was waived because it was not raised in mother's section 388 petition. Her petition challenged the order setting the section 366.26 hearing, not the sufficiency of visitation pending the permanency planning hearing. "As a general rule, a party is precluded from urging on appeal any point not raised in the trial court." (*In re Richard K.* (1994) 25 Cal.App.4th 580, 590.)

Even were we to entertain the merits, the argument would be unavailing.

It is true that when the juvenile court terminates reunification services, it "shall continue to permit the parent or legal guardian to visit the child unless it finds that visitation would be detrimental to the child." (§ 366.22, subd. (a).) Here, the juvenile court did permit visitation.[4] Moreover, once mother requested visitation in Orange County, that request was granted. But that is not even the question. The question is whether mother presented changed circumstances or new evidence on March 9, 2004, regarding visitation pending the permanency planning hearing. She did not. Her circumstances did not change, and the juvenile court was well aware of the visitation that it previously ordered. It is apparent from the record that her evidence was going to be her testimony, but she never testified.

Mother cites *In re David D.* (1994) 28 Cal.App.4th 941, 954 (*David D.*) to support her position, but that case offers her no assistance. On an appeal from the termination of parental rights, the court reviewed the order terminating reunification services and setting a section 366.26 hearing. (*Id*. at p. 953.) The court found that the reunification services were not reasonable because the juvenile court did not allow visitation after the parent attempted suicide and refused to produce her medical records. (*Id*. at pp. 952-953.) Additionally, the court noted that postservices visitation was mandatory absent a finding that visitation would be detrimental. No such finding was made, yet only one visitation

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[4] Neither party cited to an order, prior to January 14, 2004, permitting visitation. However, mother represents that the juvenile court ordered her to have "reasonable monitored post-reunification visitation."

was allowed. (*Id*. at p. 954.) This compounded the juvenile court's error. Though the parent had a strong bond with the dependent child, and thus arguably could have made a case for the exception under section 366.26, subdivision (c)(1)(A), she was prevented from meeting the regular visitation element.

Mother's case is procedurally and factually different. Her argument is directed at the denial of her section 388 petition, not the termination of her reunification services. Moreover, hers is not a case in which she was prohibited from visiting the minor, either before or after September 4, 2003.

C. *Best interests of the minor*.

In re Kimberly F. (1997) 56 Cal.App.4th 519 (*Kimberly F.*) instructs that when examining the best interests of a dependent child, a juvenile court should consider the following nonexhaustive factors: "(1) the seriousness of the problem which led to the dependency, and the reason for any continuation of that problem; (2) the strength of relative bonds between the dependent children to *both* parent and caretakers; and (3) the degree to which the problem may be easily removed or ameliorated, and the degree to which it actually has been." (*Id*. at p. 532.)

In her section 388 petition, mother stated that the requested modification was in the minor's best interest because he would receive the benefits of being raised by his mother. This was a mere conclusion that did not address any of the considerations established by *Kimberly F.*

Upon review, we conclude that the facts do not support mother's position.

The minor was detained because of the violent relationship between mother and father, and also because her emotional and mental problems limited her ability to care for the minor. Mother glosses over the fact that she did not complete her domestic violence counseling. Rather, she contends that there was no evidence of continuing domestic violence after September 2002. Next, she states: "Although [mother's] emotional problems may not have been resolved, [mother] either was attempting to resolve those problem[s] through hospitalization, or she was too ill with other medical problems to

resolve her emotional problems. . . . Consequently, the unresolved state of [mother's] emotional problems is not a basis to affirm the order denying [the] section 388 petition. [Mother] is requesting additional reunification services so that she may resolve those problems." (Citations to record omitted.)

Mother makes no attempt to compare her bond to the minor with that of the minor's bond to grandmother. She states that "the fact that the [minor] has formed a relationship with his grandparents cannot be the sole basis upon which to deny [mother's] section 388 petition." Moreover, mother does not analyze the degree to which her emotional and physical problems can be ameliorated, and the degree to which they actually have been ameliorated.

Finally, despite asking for a reversal, mother never offers any concrete reasons as to why a reversal is in the minor's best interest. We are left to query what case specific facts mother thinks are relevant. It appears mother believes that she is entitled to a modified order simply based on her claim that she did not receive reasonable reunification services. She is not.

As the Department points out, there is evidence that the minor bonded with his paternal grandparents. The Department reported that grandmother provided the minor with excellent care, and that the minor was attached to her. As well, the Department noted that the minor's brother, Brandon S., resides with grandmother and that the minor and Brandon are bonded. In contrast, at their last visit, the minor cried and struggled to get away when he was picked up by mother. He ran to his paternal grandfather for comfort. The evidence shows that the minor has a greater bond to his paternal grandparents than to mother.

Given these facts, and others, it was reasonable for the juvenile court to conclude that the minor's interest in obtaining a stable family life with his paternal grandparents outweighed the speculative benefit he might receive from further visitation with a troubled parent with whom he had not bonded.

II. The juvenile court properly terminated mother's parental rights.

Mother contends that the juvenile court erred when it determined that the beneficial relationship exception did not trump the termination of her parental rights to the minor. But after putting forth this contention, she made no effort to establish that the exception applies. Mother's real contention is that the Department did not provide reasonable reunification services. She does not come right out and say so, but her reliance on *David. D.* dictates her position.

In *David D.*, the court never reached the issue of whether parental rights should have been terminated. Instead, it held that the findings of a juvenile court referee regarding the reasonableness of reunification services were not supported by the evidence and that, as a result, the parent was entitled to six more months of reunification services. Based on that holding, the termination of parental rights had to be reversed. (*David D.*, *supra*, 28 Cal.App.4th at p. 954.)

Here, there was ample evidence that the reunification services were reasonable. The juvenile court ordered mother into individual counseling, parenting class and domestic counseling therapy. It also ordered that mother be given three visits a week, which she later agreed to reduce to two. The Department even facilitated a visitation in one of mother's psychiatric hospitals. In July 2003, mother indicated that she could not drive. But she did not request visitation in Orange County until her reunification services had been terminated. Regardless of whether mother was residing in Orange County, the juvenile court found that the Department made sure mother had access and that she had funds. These factual findings are left unchallenged by mother, and the inference is that mother could have visited the minor if she had made visitation a priority. In fact, she managed to check herself into hospitals on repeated occasions even though she supposedly could not travel. We note, as well, that the juvenile court found that mother would not allow social workers to evaluate her home. In other words, mother created a situation in which it was not possible for the juvenile court to grant visits in her home in Orange County. Besides her home, mother suggests that she should have been granted

visitation somewhere nearby, but she does not state where such visitations could have occurred. Finally, she suggests that visitations should have occurred in her various hospitals. But, as the juvenile court found, mother repeatedly went to emergency rooms but was not admitted. Therefore, her suggestion defies reason. Grandmother, the minor and the social workers could not be expected to constantly go to new, spur of the moment locations, especially when the length and time of mother's stays could never be predicted.

Last, mother argues that the Department should be estopped from asserting that the section 366.26, subdivision (c)(1)(A) exception does not apply. She cites, inter alia, *Guardianship of Ethan S.* (1990) 221 Cal.App.3d 1403, 1416-1417, which recognized that the doctrine of estoppel can be applied to establish a relationship between a child and a putative father. "'[I]n order to establish an estoppel vis-a-vis the putative father, there must be a showing that (1) the putative father represented to the child that he was his father; (2) the child relied upon the representation by accepting and treating the putative father as his father; (3) the child was ignorant of the true facts; and (4) the representation was of such duration that it frustrated the realistic opportunity to discover the natural father and to reestablish the child-parent relationship between the child and the natural father [citation].' [Citations.]" (*Id*. at p. 1416.) The court held that a putative father who was a guardian could, similarly, be estopped from claiming to be a child's father if the man consistently contended that someone else was the child's father. (*Id*. at p. 1417.) The court upheld a summary judgment brought by a natural father in order to terminate a putative father's guardianship. (*Id*. at p. 1406.)

Strain though we might, we do not see the analogy. Mother states: "Because the Department, for over six months, failed to assist [mother] with all the required court-ordered visitation with her son [the minor], it must be estopped from arguing the section 366.26, subd. (c)(1)(A) exception." This argument is not even colorable under the law. Mother does not contend that the Department made any representations, or that she relied. We need not consider the issue further.

Mother's facial argument is similarly unavailing.

If a juvenile court determines that a child is likely to be adopted, then parental rights must be terminated unless there is a compelling reason for determining that termination would be detrimental to the child because, inter alia, the parent has maintained regular visitation with the child and the child would benefit from continuing the relationship. (§ 366.26, subd. (c)(1)(A).)

It is well established that a parent bears the burden of proving that termination of parent rights would be detrimental to the child under section 366.26, subdivision (c)(1)(A). (Cal. Rules of Court, rule 1463(d)(3); *In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1350 (*Jasmine D.*); *In re Derek W.* (1999) 73 Cal.App.4th 823, 826-827; *In re Lorenzo C.* (1997) 54 Cal.App.4th 1330, 1343-1344.) This is not an easy burden to meet. "Because a section 366.26 hearing occurs only after the court has repeatedly found the parent unable to meet the child's needs, it is only in an extraordinary case that preservation of the parent's rights will prevail over the Legislature's preference for adoptive placement." (*Jasmine D.*, *supra*, at p. 1350.)

There is disagreement in the appellate courts as to whether the substantial evidence or the abuse of discretion standard of review applies to a determination regarding the exception of section 366.26, subdivision (c)(1)(A). (See *In re Autumn H.* (1994) 27 Cal.App.4th 567, 575 [sufficiency of the evidence standard]; and see *Jasmine D., supra,* 78 Cal.App.4th at p. 1351 [abuse of discretion standard].) Here, the outcome is the same under either standard.

Mother did not maintain regular visitation with the minor, and there is no evidence that the minor would benefit from maintaining their relationship. The evidence showed that the minor was bonded to his paternal grandparents, not mother. Accordingly, the juvenile court did not err when it terminated parental rights.

DISPOSITION

The orders are affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
ASHMANN-GERST

We concur:

_____, P. J.
BOREN

_____, J.
DOI TODD